



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter: Frank D. Marden - Forfeited Annual Leave

File: B-256957

Date: October 11, 1994

DIGEST

An employee forfeited annual leave at the end of the 1978 leave year because he could not use it due to the exigency of public business. The agency restored the annual leave to the employee in 1979, and advised him it would be placed in a separate account.

Subsequently, the employee transferred to another agency and the restored leave was recorded as a higher accumulation ceiling, rather than as restored leave, and was not used within the prescribed time period. The employee later transferred to another agency where the erroneous ceiling also was adopted. The error was not discovered until 1991, at which time it was determined that the excess leave in the employee's account had been forfeited. The employee argues that the forfeited leave should be restored on the grounds of administrative error. The claim is denied because forfeited leave that is not used within the prescribed time period is again forfeited and may not be restored, except under specific extenuating circumstances not present in this case.

DECISION

Mr. Frank D. Marden, an Administrative Law Judge employed by the Department of Labor, appeals our Claims Group settlement¹ denying his claim for restoration of 72 hours of annual leave and entitlement to a higher leave ceiling. We affirm the Claims Group's settlement.

BACKGROUND

As a result of a series of errors the Department of Labor (DOL) erroneously credited Mr. Marden with an annual leave ceiling of 312 hours, although the maximum number of hours to which Mr. Marden was entitled to carry over from year to year was 240 hours. 5 U.S.C. § 6304 (1988). The chain of events began in 1979, when Mr. Marden, who had been a federal employee for over 18 years, was working for the Department of Justice (DOJ). In early 1979, DOJ approved Mr. Marden's request to have 104 hours of annual leave that was forfeited at the end of the 1978 leave year restored to him based on

¹Settlement Certificate Z-2868738, March 8, 1994.

5 U.S.C. § 6304(d)(1)(B), which authorizes the restoration of annual leave forfeited due to the exigencies of public business. (Mr. Marden had scheduled leave in advance for December 1978, but had the leave canceled due to trials scheduled for that same time.)

The record includes a memorandum from the DOJ Associate Director for Operations, Personnel and Training Staff to Mr. Marden approving the restoration of the 104 hours of forfeited leave and advising him that the restored leave would be placed in a separate account. That memorandum stated that the Payroll Office would be informed of the decision to restore the leave and that the Payroll Office would notify his timekeeper how to administer the separate leave account. These instructions are consistent with the statute authorizing the restoration of forfeited leave. See 5 U.S.C. § 6304(d)(2).

While it is not clear from the record, we assume that DOJ established a separate leave account for Mr. Marden's restored leave in accordance with their advice to him. Mr. Marden asserts, however, that DOJ granted him a higher leave ceiling "rather than simply allowing a one year carry over since my schedule for the following year would not allow my absence for additional vacation time." There is nothing in the record to support Mr. Marden's assertion regarding a higher leave ceiling, which could not have been properly authorized on this basis. However, it may be that the agency determined that the exigencies which prevented his use of the leave in 1978, continued into 1979 and beyond, allowing him to continue to carry over excess leave, and Mr. Marden misunderstood this to be a higher leave ceiling.

In late October 1980, Mr. Marden transferred to the Department of Health and Human Services (HHS). The leave transfer record prepared by DOJ incident to the transfer shows that Mr. Marden's leave ceiling was 240 hours. It also showed, however, that Mr. Marden had carried over 344 hours of annual leave from 1979, had accrued an additional 160 hours and had used 168 hours, leaving a balance of annual leave to date in 1980 of 336 hours. Although the leave transfer record did not distinguish between regular leave and restored leave, the record does not show whether anyone in Mr. Marden's new agency, HHS, questioned why he had 344 carryover hours and a 240-hour ceiling. In any event, HHS apparently continued to permit Mr. Marden to carry over hours in excess of 240. Subsequently, when Mr. Marden transferred to DOL in January 1987, HHS furnished a statement to DOL showing his leave balance as 312 hours. It appears that DOL initially established his maximum leave carry over as 240 hours. However, after he made several inquiries as to why the higher amount HHS had certified to DOL was not being credited to him, DOL credited him with a 312-hour ceiling, for reasons DOL is unable to fully explain. In this regard, a July 1987 note from the timekeeper shows a balance of 339 hours of annual leave and contains the handwritten notation, "credit extra leave . . . different leave ceiling."

B-256957

In 1991, a DOL timekeeper discovered the error and reduced Mr. Marden's annual leave ceiling to 240 hours from his annual leave balance at that time, which was 312 hours, resulting in the forfeiture of 72 hours of annual leave.

In his initial appeal to our Claims Group, Mr. Marden argued that he was entitled to a higher leave ceiling and, in the alternative, that he was entitled to have the 72 hours of forfeited leave restored on grounds of administrative error. 5 U.S.C. § 6304(d)(1)(A). The Claims Group denied his claims.

In his request for reconsideration, Mr. Marden does not dispute the Claims Group's settlement with regard to the leave ceiling. Indeed, the Claims Group correctly noted that the maximum annual leave carryover ceiling is established at 240 hours for most employees by statute. 5 U.S.C. § 6304. This statute provides for higher annual leave ceilings for certain specified classes of employees, none of which applies to Mr. Marden.

Mr. Marden, however, refers to a January 22, 1992 letter from the DOL Assistant Regional Manager for Financial Management advising him that, although the 312-hour ceiling was erroneous, upon receipt from him of a formal request to have the lost leave restored, the agency would restore the leave and allow him 2 years in which to use it. He now is willing to accept that alternative.

As a result of Mr. Marden's appeal of the January 22 determination, the Director of Personnel Management and the Comptroller for the Department considered the matter, and issued an April 21, 1992 memorandum denying his claim for the higher leave ceiling and finding no administrative error upon which to restore the forfeited leave. Mr. Marden sought reconsideration, but in a May 11, 1993 memorandum, the agency Comptroller further advised Mr. Marden of his opinion that the restored leave was erroneously continued beyond its expiration date by his former agency and erroneously transferred to DOL. The Comptroller further advised that when the error was discovered at the end of 1991, the excess was correctly subtracted from Mr. Marden's leave account and DOL had no authority to return it to his account.

OPINION

We believe the analysis contained in the Comptroller's May 11 memorandum is correct.

The statutorily-authorized regulations issued by the Office of Personnel Management that implement 5 U.S.C. § 6304 provide that leave restored on the grounds of public exigencies must be used not later than the end of the leave year ending 2 years after "(t)he date fixed by the agency head, or his designated official, as the termination date of the exigency of public business which resulted in forfeiture of the annual leave." 5 C.F.R.

B-256957

§ 630.306(b).² The record does not disclose what this date was in Mr. Marden's case, although it could be no later than the date in 1980 when he transferred from DOJ to HHS, which would then at the maximum have allowed him until the end of the 1982 leave year to have used the restored leave. Forfeited annual leave may be restored only according to the terms of the applicable statute and regulations, and there is no provision for the extension of the time to use such restored leave, even in extenuating circumstances. Consequently, restored annual leave that is not used within the 2-year period is forfeited again with no further right to restoration. Dr. James A. Majeski, B-247196, Apr. 13, 1992.

Administrative error may not serve as the basis to extend the 2-year period in which to use restored annual leave. This is so even where the agency fails to establish a separate leave account as required by the statute (Patrick J. Quinlan, B-188993, Dec. 12, 1973), where the agency fails to fix the date for the running of the two years as required by the regulations (William Corcoran, B-213380, Aug. 20, 1984), or where the agency, absent regulations requiring otherwise, fails to properly advise the employee regarding the rules for the use of restored leave (Dr. James A. Majeski, *supra*).³

The basis for Mr. Marden's claim is that he should not lose the use of the restored forfeited leave since he believed DOJ had increased his annual leave ceiling because of his inability to schedule annual leave and that both HHS and DOL subsequently recognized this higher ceiling. As noted above, however, there is no evidence in the record to show that DOJ established a higher leave ceiling, which would not have been proper in any event. The memorandum approving his request for restored leave expressly states the leave would be placed in a separate account and the leave transfer record prepared by DOJ upon his transfer to HHS showed that while his leave balance was 344 hours, his ceiling was 240 hours. Furthermore, even if he had been given such erroneous advice, that

²There is a separate time period for leave forfeited due to extended exigencies which threaten the national security, safety or welfare, but that appears not to be applicable here. 5 C.F.R. § 630.309.

³The only exceptions to this rule we have recognized are where the agency erred in charging an employee's regular leave account instead of his restored account, contrary to his specific instructions and where no separate category appeared on his pay statement to reflect the restored hours, Robert D. McFarren, 56 Comp. Gen. 1014 (1977), and where the agency failed to follow its nondiscretionary policy that required the agency to plan and schedule an employee's leave to avoid forfeiture (Charles R. Cox, B-252773, Dec. 16, 1993). In those cases, we allowed the agency to substitute the restored leave for the charged annual leave and to then restore any resulting excess annual leave on the basis of administrative error. Neither exception applies to the facts of Mr. Marden's case.

would not have tolled the running of the 2-year period in which he had to use the restored leave. Corcoran, supra.

While the errors and misunderstanding that occurred in this case are unfortunate, they may not serve as the basis for extending for another 2 years the period to use leave that was restored to Mr. Marden in 1979 and forfeited at the end of the 1982 leave year at the latest.

Accordingly, the Claims Group's settlement is affirmed.

/s/ Seymour Efron
for Robert P. Murphy
Acting General Counsel

B-256957